No. 76-496

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BENSON A. WOLMAN, ET AL., APPELLANTS

v.

MARTIN W. ESSEX, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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INTEREST OF THE UNITED STATES

This case presents questions concerning, among other things, the provision of educational services to students of private religiously-affiliated schools, but off the premises of those schools. The Ohio statutes at issue here have features in common with programs established under Title I of the Elementary and Secondary Education Act of 1965, 79 Stat. 27 *et seq.*, as amended, 20 U.S.C. (and Supp. V) 241a-241o. Designed to carry out the policy of the United States to improve the quality of education in this country, Title I provides financial assistance to local education agencies serving areas with high concentrations of children from low income families. Because the adverse educational effects of poverty are

not limited to children in public schools, but also afflict children in private schools, Title I and its implementing regulations provide that the assistance should benefit both categories of children with comparable programs.

The United States Office of Education, which administers programs under Title I, informs us that in fiscal year 1977 approximately $2.05 billion was appropriated to support Title I, and that grants were made to approximately 14,000 school systems. The United States is concerned that, to the extent the Ohio programs may be similar to those funded under Title I, the Court's decision here could have a substantial effect upon the constitutionality and administration of Title I.

DISCUSSION

The Court described and discussed Title I in *Wheeler* v. *Barrera*, 417 U.S. 402. As the Court pointed out in *Wheeler*, "the legislative aim was to provide needed assistance to educationally deprived *children* rather than to specific schools, [and it therefore] was necessary to include eligible private school children among the beneficiaries of the Act" (417 U.S. at 406; footnote omitted; emphasis in original).

Title I provides funds to local educational agencies to meet the needs of educationally-deprived children in school attendance areas having high concentrations of children from low-income families (20 U.S.C. (Supp. V) 241e(a)(1)). An "educationally deprived child" is defined by the regulations of the United States Commissioner of Education as one who needs special educational assistance to raise his level of educational attainment to that appropriate for a child of his age (45 C.F.R. 116a. 2).

The Commissioner allocates the funds to the States. State educational agencies, in turn, distribute the funds to local

educational agencies under a statutory formula based on the number of children from low-income families in each school district (20 U.S.C. (Supp. V) 241c(a)(2)). In order to obtain funds, a local educational agency must submit a written application to the state educational agency proposing a project to meet the special educational needs of educationally deprived children. State agencies are authorized to approve any program, consistent with criteria prescribed by the Commissioner, that gives "reasonable promise" of meeting the needs of such children (20 U.S.C. (Supp. V) 241e(a)(1)).

The congressional declaration of policy in Title I (20 U.S.C. 241a) states that "[i]n recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs," it is "the policy of the United States to provide financial assistance (as set forth in the following parts of this subchapter) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children."

Title I authorizes financial assistance only for special programs, such as remedial reading and mathematics classes, that are designed to meet the needs of educationally deprived children. To ensure that other expenditures are not reduced upon the receipt of federal funds, the Act states that the funds will be used "to supplement and, to the extent practical, increase the level of funds that would * * * be made available from non-Federal sources * * * " (20 U.S.C. 241e(a)(3)(B)(i)), and

"in no case [will Federal funds be used] * * * to supplant such funds from non-Federal sources" (20 U.S.C. 241e(a)(3)(B)(ii)).

The statute requires that a local agency must provide services under Title I programs to disadvantaged children enrolled in both public and private schools.[1] The Act provides that a public agency must retain "control of funds provided under this subchapter, and title to property derived therefrom, shall be in a public agency * * * and that a public agency will administer such funds and property." 20 U.S.C. 241e(a)(3)(A). Local agencies furnishing such services to private school children are subject to the regulations established by the Commissioner of Education, which provide that the services furnished with Title I funds must always remain under the administrative direction and control of a public agency and may not be administered by the private school. 45 C.F.R. 116a.23(f), 116.42. No Title I funds may be used for religious worship or instruction. 20 U.S.C. 885.

In accordance with the Commissioner's regulations (45 C.F.R. 116a.23), all Title I programs are operated by public education agencies, and all persons performing services under those programs do so as employees of the public agencies.

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[1]The statute permits the state educational agency to make a grant to a local educational agency only upon its determination that, among other things, "[t]o the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, * * * [such agency has made] provisions for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate * * * " (20 U.S.C. (Supp. V) 241c-1(a) and 241e(a)(2)).

Title I is sufficiently flexible to allow local agencies to observe, where possible, state and local restrictions upon aid to private school children (*e.g.*, prohibition against dual enrollment). See *Wheeler* v. *Barrera, supra*. Accordingly, Title I programs may be provided in a different manner to private and to public school children. In addition, the content of the services could differ if the "special educational needs" required to be met under 20 U.S.C. (Supp. V) 241e(a)(1)(A) of the two groups differ. The Commissioner of Education, however, has sought to assure that the different forms in which the services may be furnished to the two categories of children provide equally a reasonable promise of meeting the needs of the children, by requiring that the services supplied to private school children "must be comparable in quality, scope, and opportunity for participation to those provided to public school children with needs of equally high priority" (45 C.F.R. 116a.23(c)).

In sum, Title I accomplishes its goal of augmenting the educational opportunities of children by providing intensive services, such as remedial reading programs, to all eligible children within the geographic area covered by a grant. Sometimes this involves, as in *Wheeler*, sending a teacher to a private school; sometimes it involves allowing private school students to attend sessions in public schools; sometimes students of both public and private schools attend sessions at a third location.

The Ohio program at issue in this case, like Title I, provides services to students enrolled in private schools, many of which are sectarian. To the extent these services are provided by public employees off the premises of the sectarian schools, they offer significantly less opportunity for "entanglement" of church and state than do on-premises services. Cf. *Meek* v. *Pittenger*, 421 U.S. 349. Off-premises

services provided by public employees do not require the State to monitor the classrooms of sectarian schools, do not require policing to ensure that public funds are not used for sectarian purposes (since the sectarian schools do not receive public funds), and do not require any visits by public employees to the sectarian schools. Accordingly, the provision of such off-premises services is not subject to the same constitutional difficulties as the provision of services on the premises of the sectarian schools. See *Wheeler* v. *Barrera, supra,* 417 U.S. at 428 (Powell, J., concurring).

But however that may be, we submit that Title I is fundamentally different from all state and local programs that offer aid to sectarian schools. The federal government has extended aid to individual children, without regard to the schools the children attend. Although a State may fulfill its duty of neutrality by opening the doors of its public schools to all children, the United States does not maintain a system of public schools, and, therefore, to offer a program that is neutral with respect to religion, the United States must make its benefits available to students in public and private schools alike.

The constitutionality of some Title I services (those provided on the premises of private schools) is the subject of a pending suit in which a comprehensive record is being compiled. *National Coalition for Public Education and Religious Liberty* v. *Califano,* S.D. N.Y., No. 76-888, filed February 25, 1976. The parties will endeavor to develop fully the extent, if any, of interference and entanglement with religion that may be caused by Title I. Because "[t]he task of deciding when the Establishment Clause is implicated in the context of parochial school aid has proved to be a delicate one * * * [. u]sually * * * requir[ing] a careful evalua-

tion of the facts of the paricular case" (*Wheeler* v. *Barrera, supra,* 417 U.S. at 426), the United States believes that the Court's decision in this case will not necessarily affect the constitutionality of Title I. Nevertheless, so that the Court will be aware of some of the considerations that support the constitutionality of Title I (and, to the extent they are similar to Title I, the Ohio programs), we have attached as an appendix to this memorandum the portion of our brief in *Wheeler* addressing the constitutionality of Title I.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1977.

APPENDIX*

A. TITLE I IS A RELIGIOUSLY NEUTRAL STATUTE THAT PROVIDES EDUCATIONAL BENEFITS COMPARABLE IN FORM AND SCOPE TO THOSE THAT THIS COURT HAS UPHELD UNDER THE ESTABLISHMENT CLAUSE.

The present statute, unlike the legislation aiding religiously-affiliated schools which this Court has recently invalidated (see *Lemon* v. *Kurtzman*, [403 U.S. 602]; *Levitt* v. *Committee for Public Education & Religious Liberty*, [413 U.S. 472]; *Committee for Public Education & Religious Liberty* v. *Nyquist*, [413 U.S. 756]; and *Sloan* v. *Lemon*, [413 U.S. 825]), was not designed primarily to provide financial assistance to private schools. Its purpose was to enable local educational authorities to meet "the special educational needs of educationally deprived children" (20 U.S.C. 241a), no matter what schools they attend. * * * Fewer than [5] percent of the children in this country who received Title I aid in fiscal year [1976] were enrolled in private schools. * * *

In constrast, the two State aid programs struck down in the *Lemon* case were specifically designed to alleviate the financial situation of the State's non-public schools and provided benefits only to those schools. *Lemon, supra,* 403 U.S. at 606-607, 609; *Sloan, supra,* [413 U.S. at 826-827]. Similarly, the New York programs which this Court invalidated * * * in *Levitt* and *Nyquist*

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*This Appendix is reprinted from pages 28-36 of the Brief for the United States as *amicus curiae* in *Wheeler* v. *Barrera*, No. 73-62, October Term, 1973. We have made editorial changes to reflect new data on Title I and to eliminate references to the positions of the parties in *Wheeler*.

involved various forms of financial aid given solely to non-public schools.

The form and scope of the educational benefits provided under Title I are comparable to those which this Court has upheld against challenges under the Establishment Clause in such cases as *Everson* v. *Board of Education,* 330 U.S. 1, where the State reimbursed parents for bus fares paid for transporting students to public and private schools; *Board of Education* v. *Allen,* 392 U.S. 236, involving a State plan under which public school authorities lent text books without charge to all students of the State, including those attending private schools, and in which the Court cited with approval its prior statement in *Everson* (330 U.S. at 16-17) that "the Establishment Clause does not prevent a State from extending the benefits of state laws to all citizens without regard for their religious affiliation" (392 U.S. at 242); and *Tilton* v. *Richardson,* 403 U.S. 672, where the Court upheld the constitutionality of the Federal Higher Education Facilities Act of 1963, under which federal grants were made to colleges and universities, including religiously-affiliated ones, for the construction of facilities to be used for secular educational purposes.

Like the programs upheld in those cases, the Title I program is religiously neutral. It provides remedial educational services for all educationally deprived children, no matter which schools they attend. It is not designed to aid private schools. Indeed, since the remedial educational services to be provided under Title I are required to be supplementary to those "made available from non-Federal sources" (20 U.S.C. 241e(a)(3)(B)(i))—*i.e.,* they must be in addition to those the schools normally provide—Title I may fairly be viewed as not providing any

aid to the religiously-affiliated schools in their normal operations. To whatever extent Title I does provide government aid to religiously-affiliated schools, therefore, the aid is at most indirect and peripheral. It is a far cry from the types of government assistance to religiously-affiliated schools that this Court has previously invalidated under the Establishment Clause.

B. TITLE I MEETS THE CRITERIA THIS COURT HAS APPLIED FOR DETERMINING WHETHER A STATUTE SATISFIES THE ESTABLISHMENT CLAUSE.

In *Committee for Public Education* v. *Nyquist, supra,* the Court summarized the "well defined three-part test that has emerged from our decisions" [413 U.S. at 772] that, "to pass muster under the Establishment Clause," a statute

> first, must reflect a clearly secular legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and, third, must avoid excessive government entanglement with religion [413 U.S. at 773, citations omitted].

Title I satisfies all three of these criteria.

1. *Title I Has a Clearly Secular Purpose.*

* * * Title I has a secular purpose. * * * [T]he aim of Congress was to provide important remedial educational services to all educationally deprived children without regard to whether they attend public or private schools. The objective was not to aid religiously-affiliated schools but to help educationally deprived children regardless of the schools they attend.

2. *Title I neither Advances nor Inhibits Religion.*

* * * Title I is religiously neutral. It provides remedial educational services to all children, including those attending private schools. No governmental funds are given to the private schools or used to pay teachers for conducting regular instruction in those schools. The educational services provided supplement the regular curriculum, and are performed exclusively by employees of the public educational agencies.

There is nothing in the Title I program that furthers or aids the private schools in conducting the religious aspects of their educational programs, or inhibits them from doing so. Although the provision of Title I remedial services on the premises of religiously-affiliated schools could make those schools more attractive to the parents of children attending them, that collateral benefit is "not such support of a religious institution as to be a prohibited establishment of religion within the meaning of the First Amendment" (*Board of Education* v. *Allen, supra,* 392 U.S. at 242; see, also, *Everson* v. *Board of Education, supra,* 330 U.S. at 17-18).

[It might be argued] that Title I and the Commissioner's regulations constitute a prohibited support of religion because they contain no effective safeguards to insure that the public school teachers will not utilize the remedial educational instruction as a vehicle for inculcating religious beliefs. This possibility is so unlikely and remote that it affords no basis for concluding that the Title I program constitutes government support of religion.

* * * [T]he Title I programs are formulated, administered and operated by the public educational agencies. The teachers providing the services, no matter where they do so, are employed by and under the complete control of the

public agencies. Accordingly, there is not here present the "potential for conflict" that concerned this Court in *Levitt* v. *Committee for Public Education & Religious Liberty,* [*supra,* 413 U.S. at 480], which struck down a New York statute providing grants to religious schools to prepare State-required examinations. There the Court noted (*ibid.*) "the substantial risk that these examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church." See *Lemon* v. *Kurtzman, supra,* 403 U.S. at 617, where this Court spoke of "the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of pre-college education."

[Under Title I], in contrast, the religiously-affiliated schools would have no control over either the content of the special remedial instruction or the way in which the instruction were given. [Even when the educational services were offered on the premises of the sectarian school, those] determinations would be made by the public educational authorities solely on the basis of the secular standards provided in Title I and the Commissioner's regulations * * * . The public school teachers providing the services would not be subject to the authority and discipline of the people running the religiously-affiliated schools, but only to the control of the public agencies which hire, pay and direct them. As Mr. Justice Brennan pointed out, in explaining his vote to deny certiorari in *Nebraska State Board of Education* v. *School District of Hartington,* 409 U.S. 921, where the lower court had upheld the provision of Title I remedial reading and

remedial mathematics services to both public and private school students upon premises the school district had leased from a Catholic school:

> [T]he school district would have no part whatever in the curriculum of the parochial school either by way of subsidy of its costs through financing of teaching or otherwise. The remedial reading and remedial mathematics courses would operate completely independently of that curriculum and of the Catholic school administration [*id.* at 926].

3. *Title I Involves No Excessive Government Entanglement with Religion.*

The basic character of the Title I programs— under which employees of local educational authorities working under the control and supervision of those authorities provide supplementary remedial educational services to educationally deprived children pursuant to plans formulated and administered by the public authorities—insures that the programs will not involve excessive government entanglement with religion.

* * * *Lemon* v. *Kurtzman, supra* [, is not to the contrary]. There this Court invalidated two State plans for providing financial aid to private schools, because they involved excessive government entanglement with religion. The aspects of those plans which constituted such entanglement, however, are not present in the Title I programs.

The two State plans struck down in those cases involved direct State grants (1) to private schools for the costs of teaching secular subjects and (2) to teachers of secular subjects in those schools. The administration and control of the teaching and the content of the secular courses were under the direct supervision and

control of the religiously-affiliated schools. In those circumstances, as the Court noted, the States inevitably would be required to conduct "comprehensive, discriminating, and continuing surveillance" of the schools to assure that the secular purposes of the financial aid were observed (403 U.S. at 619).

In contrast, there would be no occasion for such public surveillance of private schools in connection with the operation of Title I programs. Those programs require no distinction to be made between secular and sectarian subjects, and are conducted by employees of public educational agencies under the complete control of those agencies.[9]

There is similarly no likelihood that providing Title I services on private school premises would create the serious potential for political divisiveness that also concerned the Court in *Lemon* (403 U.S. at 622-624). The State plans there involved annual legislative appropriations "that benefit relatively few religious groups" and that were thus likely to intensify "[p]olitical fragmentation and divisiveness on religious lines" (*id.* at 623). The Court distinguished (*ibid.*) *Walz* v. *Tax Commission,* 397 U.S. 664, which upheld state tax exemptions for real property owned by religious organizations and used for religious worship, on the ground that that decision "dealt with a status under state tax laws for the benefit of all religious groups," where the like-

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[9]Of course, there will be circumstances in which the public educational authorities will review the performance of Title I teachers who provide services on private school premises. But the purpose would not be * * * to determine whether the teachers are fostering religion, but whether they are teaching effectively. This review would be required whether particular teachers teach in public or private schools, or in both.

lihood of such "[p]olitical fragmentation and divisiveness" was much less.

* * * [U]nlike the State plans involved in *Lemon*, [Title I] is not designed to benefit religiously-affiliated schools at all, and whatever benefit it may give them is collateral and incidental. Only about [4.7] percent of the children who would receive benefits under Title I attend private schools. "[I]n terms of the potential divisiveness of any legislative measure the narrowness of the benefited class would be an important factor" (*Nyquist, supra*, [413 U.S. at 794]). In the present case, as in *Allen* and *Everson*, "the class of beneficiaries included *all* school children, those in public as well as those in private schools" (*id.* at [782], n. 38, emphasis in original). Here as in those cases, there is not sufficient potential for creating divisiveness to constitute a prohibited governmental entanglement with religion.